IN THE

Supreme Court of the United States

October Term, 1949

No.....

G. PULLEN JACKSON AND FRANK L. HORAN, a Partnership, practicing under the name of JACKSON AND HORAN, Appellants,

v.

HARRY V. VANCE, Trustee of the Estate of WILLIAM O. STUART: and ALBUQUERQUE NATIONAL TRUST AND SAVINGS BANK, Appellees,

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PETITION FOR WRIT OF CERTIORARI

The appellants below, petitioners here, respectfully petition for a writ of certiorari to be directed to the United States Court of Appeals, Tenth Circuit, to review a judgment of that Court, entered on the 30th day of December, 1949, petition for a rehearing denied the 24th day of January, 1950, and affirming a judgment of the United States District Court, for the District of New Mexico, in favor of Respondent and against petitioner and in support thereof respectfully show the court:

I.

That on February 1, 1947, petitioners entered into a written contract with W. O. Stuart to prosecute certain

claims against three insurance companies, who had insured Stuart against loss by fire. Pursuant to their employment petitioners prepared necessary and extensive proofs of claim and when liability was denied, petitioners brought suit in the District Court of Bernalillo County, New Mexico, on June 16, 1947. On June 19, 1947, W. O. Stuart was adjudicated a bankrupt by the United States District Court for the District of New Mexico. Vance, the trustee in bankruptcy, moved the State District Court to have himself substituted as party plaintiff, in the place of W. O. Stuart, which the State District Court ordered and by the same order fixed a charging and retaining lien in favor of appellants in an amount of 15% of any amounts recovered in the cause in the State District Court. This action in the State District Court was settled in favor of plaintiff for $60,000.00, and the action dismissed with prejudice. Petitioners took action in the State District Court, and in the United States District Court sitting as a Bankruptcy Court to enforce their lien. The United States District Court denied the validity of petitioners lien and reversed the referee in Bankruptcy who had held that Petitioners had a lien on $25,000.00, and this action of the District Court was affirmed by the Court of Appeals. From this judgment this petition is prosecuted.

II.

This case involves four questions:

1. Does a lien created by a contract have the same force, effect, and dignity as a mortgage, where only services were furnished under the contract and money and goods were supplied under the mortgage?

2. Can a Federal Court permit its officers, and Trustee in Bankruptcy to use the State Courts, and take advantage of the orders, judgments, or decrees that are favorable; but reject all unfavorable action of the State Court on the theory it is without jurisdiction to enter such orders, judgments, or decrees?

3. Jurisdictional conflict between State and Federal Courts.

4. Did the judgment, order, or decree of the state court become binding and res judicata regardless of whether or not the Court had jurisdiction at the time it entered judgment, no appeal having been taken within the time prescribed by law?

III.

Petitioners rely on the following for the granting of the writ:

1. That the decision in this case, which is included in and made a part of the record herewith, is in direct conflict with Sherman vs. Buckley, 119 F(2d)280, cert. denied, 86 L. ed 527, 314 U. S. 657, decided by the Court of Appeals, Second Circuit. Mr. Justice Murrah of the Tenth Circuit dissented from the majority opinion, stating:

> "In my view, this case is not different from Sherman vs. Buckley, 119 F. 2d 280, and I would reverse the judgment on the authority of that case."

2. That an important question of Federal law has not been, but should be settled, by the United States Supreme Court.

3. That the Court of Appeals has decided a Federal

question in a way which is probably in conflict with the decisions of this Court.

IV.

Your petitioners present to this Court, as an exhibit to this petition, a certified transcript of the record of the case as it appeared in the Circuit Court of Appeals, Tenth Circuit.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari may issue to the United States Court of Appeals, Tenth Circuit, so that the judgment of that Court may be revised by this Court.

Arthur T. Hannett,
Attorney for Petitioners

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IN THE

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G. PULLEN JACKSON AND FRANK L. HORAN, a Partnership, practicing under the name of JACKSON AND HORAN, Petitioners.

v.

HARRY V. VANCE, Trustee of the Estate of WILLIAM O. STUART; and ALBUQUERQUE NATIONAL TRUST AND SAVINGS BANK, Respondents.

BRIEF OF PETITIONERS

STATEMENT OF THE GROUNDS ON WHICH JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES IS INVOKED.

1. That the decision in this case, which is included in and made a part of the record herewith (Tr. 51, 57), is in direct conflict with Sherman vs. Buckley, 119 F (2d) 280, cert. denied, 86 L. ed 527, 314 U. S. 657, decided by the Court of Appeals, Second Circuit. Mr. Justice Murrah of the Tenth Circuit dissented from the majority opinion, stating:

> "In my view, this case is not different from Sherman vs. Buckley, 119 F. 2d 280, and I would reverse the judgment on the authority of that case."

2. That an important question of Federal law has not

been, but should be, settled by the United States Supreme Court.

3. That the Court of Appeals has decided a Federal question in a way which is probably in conflict with the decisions of this Court.

STATEMENT OF CASE

This action is to enforce an attorneys' lien on the proceeds of a cause of action adjudicated by the District Court of Bernalillo County, State of New Mexico. The petitioners were the first attorneys of record for the plaintiffs in the case of W. O. Stuart, et al. vs. Pacific National Fire Insurance Company, et al, No. 37588, District Court, County of Bernalillo, State of New Mexico.

The bankrupt owned a stock of merchandise on the 28th day of January, 1947, covered by $125,000.00 of insurance, which was destroyed by fire on such date.

The bankrupt employed petitioners, attorneys, on the first day of February, 1947, by written contract to prosecute his claim against certain insurance companies. The insurance was carried by three separate companies and it was necessary to prepare three Notices of Claim and three long and complicated Proofs of Loss, which were duly prepared by petitioners and submitted to the three insurance companies. Negotiations were thereupon entered into for settlement and depositions taken. Said Notices and Proofs were a condition precedent to recovery against the insurance companies. In this connection, specific reference is made to State Court's Order (Tr. 1), hereafter referred to in this brief.

After extended negotiations with the insurance companies, petitioners were unable to effect a settlement and thereupon filed a suit against the insurance companies in the District

Court of Bernalillo County, State of New Mexico on June 16, 1947 (Tr. 1).

Thereafter, on July 12, 1947, petitioners filed an Amended Complaint, which asked judgment against the three insurance companies in the total sum of $125,000.00.

On June 16, 1947, involuntary bankruptcy proceedings were filed against Stuart, and on June 19, 1947, Stuart confessed bankruptcy and was adjudicated bankrupt in the U. S. District Court for the District of New Mexico. Before the suit in the State Court came to issue, Harry V. Vance, as trustee for the bankrupt, filed a motion to be substituted as party-plaintiff and asked for removal of petitioners. On August 20, 1947, Stuart and the petitioners filed a motion to strike the motion of Harry V. Vance, the trustee. Harry V. Vance was substituted as plaintiff in the place of Stuart, and he installed Threet and Hall as attorneys for said trustee. The State Court thereupon entered an order (Tr. 1) fixing a charging and retaining lien in favor of Jackson and Horan in the amount of 15% of all monies to be recovered in the litigation.

A Second Amended Complaint was filed by the trustee, September 9, 1947, making the Albuquerque National Trust and Savings Bank a party-defendant and on the same date, the bank, through its attorneys, accepted service.

On the 8th day of October, 1947, the Albuquerque National Trust and Savings Bank filed its Answer and Cross-Complaint, asking judgment for $60,000.00 against the insurance companies on a series of notes secured by warehouse receipts and executed by Stuart. On March 25, 1948, the insurance companies filed their respective Answers.

The Trustee in Bankruptcy continued to invoke the jurisdiction of the State Court in the litigation against the insurance companies up to and until the insurance com-

panies settled and a satisfaction of judgment was entered in the State Court on the 25th day of October, 1948 (Tr. 5, 48).

On September 3, 1948, petitioners discovered that the insurance companies, acting through their attorney, had entered into an agreement with the Albuquerque National Trust & Savings Bank for a stipulated judgment of $60,000.00 to be paid to the bank directly, ignoring petitioners' lien and bankruptcy proceeding. Whereupon petitioners obtained an injunction against the insurance companies and the bank in the State Court litigation restraining them from carrying out such an agreement until the lien of the petitioners was satisfied coincident with the payment to the Bank. The Trustee in Bankruptcy thereupon obtained a restraining order from the United States District Court for the District of New Mexico restraining petitioners from attempting to enforce their lien in the State Court (Tr. 3).

As will appear from Judge Kool's Order (Tr. 1), fixing the lien for services of petitioners, the Trustee in Bankruptcy by the terms of the same Order was permitted to intervene and was represented by his attorneys, Threet and Hall. More than a year had elapsed since the said Order, which was final and appealable, but the Trustee in Bankruptcy and his attorneys did not appeal from said Order to the Supreme Court of New Mexico. Instead, the Trustee in Bankruptcy continued to submit to and invoke the jurisdiction of the State Court in the case until final judgment (Tr. 5) was entered and satisfied. Furthermore, neither the Trustee in Bankruptcy nor his attorneys took any steps whatever to prevent the payment by the insurance companies to the bank, rather than to the Trustee in Bankruptcy (Tr. 3).

More than four months elapsed between the contract of employment of the petitioners (Tr. 1) and the adjudication of Bankruptcy (Tr. 25).

SPECIFICATION OF POINTS RELIED UPON AS ERROR.

I.

The Trial Court erred in holding and finding that no lien had been created by the contract between Stuart and petitioners, as confirmed by the Order, Judgment and Decree of the District Court of the Second Judicial District within and for the County of Bernalillo, State of New Mexico.

II.

The Trial Court erred in granting the injunction restraining the petitioners from pursuing their remedies in the State Court to enforce the petitioners' retaining and charging lien.

III.

The Trial Court erred in holding that the State Court had no jurisdiction to award petitioners a lien on the fund which was created largely through their efforts, inasmuch as the Trustee in Bankruptcy caused himself to be made party-plaintiff in the State Court litigation and invoked that State Court's jurisdiction until final judgment was entered in the State Court. The Trustee thereby availed himself of the services theretofore rendered in the State Court by the lien claimants, and submitted to and invoked the State Court's jurisdiction as to all things including the lien of these lien claimants, which he now seeks to avoid.

IV.

The Trial Court erred in holding as a nullity the judgment of the State Court awarding lien claimants a charging and retaining lien.

V.

The Trial Court's holding that the judgment of the State

Court awarding lien claimants a retaining and charging lien was not res judicata is an error since it affirmatively appears that the time for appeal from said judgment awarding said lien, i.e., one year, had long since expired at the time the matter was passed upon by the Trial Court in this cause.

ARGUMENTS AND AUTHORITIES

Point I.

THE TRIAL COURT ERRED IN HOLDING AND FINDING THAT NO LIEN HAD BEEN CREATED BY THE CONTRACT BETWEEN STUART AND PETITIONERS AS CONFIRMED BY THE ORDER, JUDGMENT AND DECREE OF THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT WITHIN AND FOR THE COUNTY OF BERNALILLO, STATE OF NEW MEXICO.

The question of an attorney's right to a lien upon a fund which by his efforts he has aided in creating has been settled by the Supreme Court of the State of New Mexico in the case of *Prichard v. Fulmer*, 22 N. M. 134, 159 P. 39, 2 A. L. R. 474.

The court, in that case recognizes and approves the rule of law that an attorney has a retaining lien upon the papers, documents and money that come into his hands professionally as an attorney and that he is entitled to retain possession of such papers, documents and money until the money due him for professional services is paid, and also holds that it is the right and duty of the State Court to preserve and protect such lien and further recognizes the power of the court to interfere and prevent payment by the judgment debtor in fraud of the attorney's rights. The court in that case said:

"The courts also recognize . . . and also the right to have the court interfere to prevent payment by the judgment debtor to the creditor in fraud of his right to the same and also to prevent or set aside assignments and settlements made in fraud of his rights."

Point II.

THE TRIAL COURT ERRED IN GRANTING THE INJUNCTION RESTRAINING THE PETITIONERS FROM PURSUING THEIR REMEDIES IN THE STATE COURT TO ENFORCE THE PETITIONERS' RETAINING AND CHARGING LIEN.

The District Court of Bernalillo County, New Mexico, had jurisdiction to enter its restraining order against the defendant insurance companies in the case pending before itself (the State District Court) and had jurisdiction to enforce the Order fixing a lien which it had previously entered and the United States District Court was without jurisdiction sitting as a court of bankruptcy to interfere with the State District Court by entering its injunction against the petitioners herein.

The case of *Prichard v. Fulmer* (supra) establishes the right of an attorney to have the court intervene on his behalf to prevent payment of a judgment in fraud of the attorney's rights to compensation for his services in such court. It is clear that the State Court, by entering its temporary restraining order, was undertaking, in accordance with the ruling enunciated in the *Prichard* case, to protect the rights of its attorneys and officers and to effect payment of their just compensation as determined by the court (*O'Hara v. Oakland Co.*, 136 F. (2d) 152, 6 CCA).

The right of the State Court to so act is also recognized in the case of *Sherman v. Buckley*, 119 F. (2d) 280, Circuit Court of Appeals, Second Circuit, decided April 28, 1948.

Certiorari was denied by the Supreme Court of the United States, 86 L. ed. 527, 314 U. S. 657. This case is squarely in point with the case at bar. The attorneys in the *Sherman* case were employed before bankruptcy, they eventually secured a judgment after bankruptcy, and then proceeded to enforce their lien. The Trustee in Bankruptcy applied to the Federal Bankruptcy Court for an Order enjoining the attorneys from prosecuting their claim in the State Court on the grounds that the State Court had no jurisdiction over the recovery because the right of action was an asset in bankruptcy.

The United States District Court, upon hearing, held that the State Court had no jurisdiction to liquidate the lien and for this reason it enjoined the attorney from proceeding in that Court. However, the Circuit Court of Appeals, speaking through Mr. Justice Hand, held that the State Court did have jurisdiction and that when the Trustee in Bankruptcy became a party to the cause in the State Court, he subjected himself to the jurisdiction of the State Court for all purposes. The court further said that in support of the act, the jurisdiction of the bankruptcy court is usually held to be exclusive, but it may consent to have the interest of third persons in property of which the bankrupt had possession, adjudicated in a State Court if that is more convenient, and that it necessarily follows that the trustee consented to the exercise of that court's jurisdiction. To the same effect see *In re Prudence*, 96 F. (2d) 157, Certiorari denied 83 L. ed. 393, 305 U. S. 616-617. See also *In re San Juan Gold, Inc.*, 96 F. (2d) 60.

The majority opinion of the Court of Appeals, Tenth Circuit, places its decision on the grounds that the facts of this case and *Sherman vs. Buckley* (supra) are distinguishable (Tr. 55). Your petitioners can see no distinction between the cases and neither could Mr. Justice Murrah (Tr. 57).

As the record discloses petitioners have followed the *Sherman* case since the inception of this action because it is the only reported authority in point.

In the *Prudence* case, the attorney had prosecuted litigation on behalf of a client whose bankruptcy intervened before the litigation was completed, and had been subsequently denied his agreed fee by the Federal District Court, the Circuit Court of Appeals held that, since the attorney had a lien for his services, the intervening bankruptcy did not invalidate such lien and the attorney was entitled to enforce his lien in the bankruptcy court upon the terms and conditions of his contract with the bankrupt.

The petitioners here had a valid and subsisting lien fixed by the court where the litigation was pending. Their contract was entered into more than four months prior to bankruptcy and under the law established by the two preceding cases, the United States District Court for New Mexico erred in interfering with the State Court in protecting the rights of the State Court's attorneys.

Point III.

THE TRIAL COURT ERRED IN HOLDING THAT THE STATE COURT HAD NO JURISDICTION TO AWARD THE PETITIONERS A LIEN ON THE FUND WHICH WAS CREATED LARGELY THROUGH THEIR EFFORTS INASMUCH AS THE TRUSTEE IN BANKRUPTCY CAUSED HIMSELF TO BE MADE PARTY-PLAINTIFF IN THE STATE COURT LITIGATION, AND INVOKED THAT STATE COURT'S JURISDICTION UNTIL FINAL JUDGMENT WAS ENTERED IN THE STATE COURT, THE TRUSTEE HEREBY AVAILED HIMSELF OF THE SERVICES THERETOFORE RENDERED IN THE STATE COURT BY THE LIEN CLAIMANTS, AND SUBMITTED TO

AND INVOKED THE STATE COURT'S JURISDICTION AS TO ALL THINGS INCLUDING THE LIEN OF THESE LIEN CLAIMANTS, WHICH HE NOW SEEKS TO AVOID.

The court having jurisdiction of a cause has authority to establish, evaluate, and provide for the payment of the court costs, including the fees of its attorneys (*Fox v. Loflund*, 98 F. (2d) 589). It may make such findings effective by retaining so much of the funds recovered as passed through its hands.

In this case, the State Court did evaluate the services and recognized the existence of the lien (Tr. 1) and then to make its findings effective, impressed the lien upon such proceeds as might be recovered.

This left the Trustee in Bankruptcy with three alternatives: (*Sherman v. Buckley* and *In re Prudence* (supra)).

1. He could dismiss the case without prejudice and avoid such lien, since no Answer had been filed (Rule 41 (a) 1, Rules of the District Courts of the State of New Mexico, New Mexico Statutes, 1941, Annotated, 19-101 41 (a) 1), and he could start over without liability to appellants.

2. He could appeal to the Supreme Court of the State of New Mexico from the Order of the State Court recognizing the attorneys' lien.

3. He could go ahead with the pending lawsuit against the insurance companies, subject to the lien in favor of Jackson and Horan (*In re Prudence*).

As a matter of fact, the trustee followed the third procedure. Whether he did so because he thought the recovery would be nominal or because he thought the Order invalid, makes no difference. In any event, he availed himself and took advantage of the services theretofore rendered by

Jackson and Horan (*Buell v. Kanawah Lumber Corporation*, 201 F. 762), and continued to invoke the State Court's jurisdiction until recovery from the insurance companies was made.

The respondents eagerly accepted the $60,000.00 made available through the efforts of petitioners but with equal enthusiasm sought and still seek to avoid paying them for their work.

Point IV.

THE TRIAL COURT ERRED IN HOLDING AS A NULLITY THE JUDGMENT OF THE STATE COURT AWARDING LIEN CLAIMANTS A CHARGING AND RETAINING LIEN.

The Trial Court in holding that the judgment of the State Court was a nullity was patently in error and contrary to well-established principles of law. The Order of the State Court was a final order under the holdings of the Supreme Court of New Mexico before the present rules were adopted, which do not change the definition of an appealable order. In the case of *Nehr v. Crawford*, 10 N. M. 725, 65 P. 156, the Supreme Court of New Mexico held that a decree allowing compensation to a Master and his attorney was a final judgment or decision from which an appeal could be taken.

It clearly appears from the record that the Trustee in Bankruptcy did not appeal from the Order and it still stands in full force and effect. It is well established also that when a party and persons in privy with him subjects himself to the jurisdiction of the court and litigates matters before it, he, as well as his privies, is barred from any new action upon the same cause of action, even though the original judgment may have been erroneous or the court which rendered it may have been mistaken as to the facts or may have misconstrued the law or may have disregarded public policy (*Clegg v. U. S.*, 112 F. (2d) 886 CCA 10th).

Point V.

THE TRIAL COURT'S HOLDING THAT THE JUDGMENT OF THE STATE COURT AWARDING PETITIONERS A RETAINING AND CHARGING LIEN WAS NOT RES JUDICATA IS AN ERROR SINCE IT AFFIRMATIVELY APPEARS THAT THE TIME FOR APPEAL FROM SAID JUDGMENT AWARDING SAID LIEN HAD LONG SINCE EXPIRED AT THE TIME THE MATTER WAS PASSED UPON BY THE TRIAL COURT IN THIS CAUSE.

The policy of the law is to prevent interminable delay in litigation and repetition of hearings on questions previously decided.

This principle holds final an order of a court of competent jurisdiction on a matter decided between two parties or their privies, the decision being final after a fixed time for appeal has passed. The Albuquerque National Trust & Savings Bank was a party to the litigation and equally bound with all other parties.

In the instant case, petitioners had filed the Complaint and were subject to the jurisdiction of the court. The insurance companies had been served with process and they were under the jurisdiction of the court. The Trustee in Bankruptcy had himself substituted as party-plaintiff and deliberately brought himself under the jurisdiction of the court (Tr. 1). The only party to this appeal who was not a party to the hearing before the State Court was the bank and it subsequently became a party when it was made a party-defendant by the action of the Trustee in Bankruptcy.

The defendant insurance companies, the defendant bank and the Trustee in Bankruptcy entered into a consent judgment in the State Court in the proceedings instituted by the petitioners and satisfied that judgment in the State Court.

The bank never at any time raised any objection in the State Court to the lien fixed by that court in favor of the petitioners.

In fact, neither the trustee nor the bank took any action of record from August 21, 1947, to October 25, 1948, to avoid said lien. The time for taking an appeal from the District Courts of New Mexico to the Supreme Court of New Mexico is 90 days (Rule 5, Rules of the Supreme Court of New Mexico, Sec. 19-201 (5), New Mexico Statutes, 1941, Annotated). The actual time between the Order and the first record of objection of the respondents here is more than 13 months when they appealed to the Federal Court for injunctive relief.

Since the time for filing an appeal had passed, the Order of the District Court of Bernalillo County was res judicata between Jackson and Horan on the one hand and the Trustee in Bankruptcy and the bank on the other.

The respondents litigated the question of petitioners' lien in the State Court but when they discovered the Order was burdensome, they immediately moved to another forum and again litigated the questions previously determined. It is therefore apparent that they have twice had their day in court. *Baldwin v. Iowa State Traveling Men's Association*, 283 U. S. 522, 75 L. ed. 1244; *American Surety Co. v. Baldwin*, 287 U. S. 156, 77 L. ed. 230.

It is therefore respectfully submitted that the Order and Judgment of the United States District Court for the District of New Mexico and the affirming judgment of the United States Court of Appeals should be reversed and the cause remanded to the District Court with instructions to dissolve the injunction against the petitioners enforcing their lien for attorneys' fees as fixed by the State Court, and to set aside its Order directing the Referee in Bankruptcy to

ignore the lien of the State Court and to fix a reasonable attorneys' fee, and to order the Referee in Bankruptcy and the Trustee to forthwith pay the petitioners' lien for the attorneys' fees in the sum of $9,000.00, together with interest at the rate of six (6) per cent from December 7, 1948, the date of final judgment in the State Court.

ARTHUR T. HANNETT

Attorney for Petitioners

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HARRY V. VANCE, Trustee of the Estate of WILLIAM O. STUART; and ALBUQUERQUE NATIONAL TRUST AND SAVINGS BANK, Respondents.

REPLY BRIEF OF PETITIONERS

Respondent states that petitioners filed an inadequate transcript with the U. S. Circuit Court of Appeals.

Petitioners quite readily admit that this is true and further state that the record is really inadequate today, but unfortunately petitioners do not have a bank financing them and financial circumstances would not permit a complete transcript of the record.

Respondents further state that petitioners have gone outside of the record at Page 4 of their brief. Perhaps petitioners have, but we believe that the order of Judge Arledge (Tr. 47) adequately supports statement made by petitioners and it is further interesting to note that respondents do not deny its veracity.

POINT I.

Under this point, respondents apparently intend to argue that an attorney in New Mexico does not have a charging and retaining lien to secure him for his services, stating amongst other things that New Mexico has no statute giving a charging or retaining lien to attorneys. As a matter of fact, New Mexico does have such a statute.

Section 19-303, New Mexico Statutes, 1941, Annotated states:

> "In all the courts of this State, the common law as recognized in the United States of America shall be the ruling of practice and decision."

In Pritchard vs. Fulmer, 22 N.M., 134, 159 P. 39, 2 ALR, 474, the Court says:

> "There being no statute here, in order to determine the right of an attorney in this regard in this State, we are necessarily required to resort to the Common Law and to the practice prevailing in Courts of Equity in such cases. The English courts, at an early date, not easy of ascertainment from the reported cases, recognized the right of an attorney to retain papers or other property that might come into his possession or money that he in the course of his professional employment had collected, until all his costs and charges against his client were paid * * * The courts also recognized what is generally styled an attorney's 'Charging Lien', although it has been frequently stated by the courts and law writers that in a strict sense there is no such a thing as a lien upon a thing not in possession."

The Court states further in its decision:

> "The charging lien, as recognized by the courts, is the right of an attorney or solicitor to recover his fees and moneys expended on behalf of his client from funds recovered by his efforts and also the right to have the court interfere to prevent payment by the judgment debtor to the creditor in fraud of his rights to the same, and also to prevent or set aside assignments and settlements made in fraud of his right. * * * It does not usually attach until the recovery of judgment and then does not prevent an honest settlement nor payment to his client until attorney has notified the debtor of his intention to claim a lien."

The only Judge who has passed upon this question was the State District Judge and he must have been convinced that the Pritchard Case was the law of the forum and he was bound to follow it. Mr. Vance, the Trustee acquiesced in the judgment.

Every argument advanced by the respondents is fully answered and disposed of by the Pritchard Case. The Supreme Court of New Mexico states that an attorney's charging lien is a peculiar lien in that it has nothing in possession until the judgment is entered.

Almost any law suit of the type and class before the State District Court is for an unliquidated amount.

Respondents state that the question is not presented as to whether or not a client is attempting to defraud his attorney. It is believed that the word "defraud" is used advisedly in the decision. The ultimate result of the position of the respondents is that they tried their case in the State District Court. Being dissatisfied with the results, they now wish to try it over in a new forum, the sole pur-

pose being to deprive petitioners of a fee to which they are well entitled.

POINT II.

Respondents persist in arguing a point of law under Point II, which petitioners have never contended. We have never cited the Pritchard Case or O'Hara vs. Oakland County, 136 F.(2nd), 152, 6 CCA, to the effect that it disposed of a question of jurisdictional conflicts. We cited them for the proposition that an attorney is entitled to a charging lien to reimburse him for his efforts. The rule in the State of New Mexico is that an attorney does have a charging lien. The law is so well established that the courts of the United States are bound by the decisions of the highest courts of the State in which they sit that authority for the proposition is unnecessary.

It is quite true, as stated by the respondent, that the Court denied a lien in the Pritchard case but in that case the attorney failed to protect his rights. Petitioners have never failed to make public at all times their claim of lien and have taken every step possible under the laws of the State of New Mexico and under the laws of the United States to call to the attention of the world their claim of lien.

POINT III.

Point III of respondent's answer seems to be devoted first to ridiculing the complaint filed by petitioners and next to attempting to explain away Sherman vs. Buckley, 119 F (2d) 280. In their argument under this point, respondents argue that because Sherman vs. Buckley, supra is decided in the State of New York under a statutory provi-

sion for attorney's charging liens, that it can be distinguished from a case decided in the State of New Mexico wherein an attorney's protection comes from the common law rather than from an act of the legislature. The courts of New Mexico have recognized an attorney's charging lien as a valid and subsisting lien.

Vance, the Trustee, entered his appearance in court, took advantage of all of the work done by petitioners, and whether or not petitioners' complaint was adequate, it was certainly sufficient to ultimately bring a judgment of $60,000 which the trustee in bankruptcy and the Albuquerque National Bank have gone at great lengths to protect at the expense of the petitioners.

There is simply no way to explain away Sherman vs. Buckley supra. That case covers every phase of this case, and that case has been followed by the petitioners as the only case in point and the course pursued by petitioners in this litigation has been in exact conformity to Sherman vs. Buckley, supra.

In Sherman vs. Buckley, supra, Mr. Justice Hand said at page 282:

> "We deal with the case as though he (Sherman, Trustee) had been openly the party plaintiff. He could of course substitute other attorneys, as he did, and Buckley and Buckley were obliged to retire; but the substitution did not affect their charging lien."

We think this brings us squarely within the Buckley case. In the instant case the trustee did not pursue the litigation under the name of the bankrupt. He did not attempt to hide behind the bankrupt. He substituted himself "as a party openly." Mr. Justice Hand treats the Sherman case on the basis that Sherman was the party plaintiff. How,

then, can there be a distinction between the two cases as Vance was actually substituted party plaintiff in the case at bar?

Respondents quote from Judge Hand's decision apparently relying on the following language: "That as the trustee had brought Buckley and Buckley summarily into the bankruptcy court and insisted upon the liquidation of their lien * * * they would not have had any defense." We believe the correct interpretation of Judge Hand's statement is simply this: That the trustee in bankruptcy had two forums in which he could have liquidated the lien—he could have done it in the State Court or in the Federal Bankruptcy Court, but not in both. Mr. Vance elected to determine the rights of petitioners in the State Court, as did the trustee in the Sherman Case.

Respondents take an inconsistent position as to liens. They contend that since their notes were secured by chattel mortgages and warehouse receipts that they are preferred creditors. If the law gives the lien, we do not comprehend why a lien secured by goods and chattels is any more valid than a lien secured by a prospective judgment. The ultimate and important fact is—does the law give a lien against an ultimate res whether now in being or to be created?

If the litigation had originated in the Federal District Court, it is quite reasonable to believe that the lien claimants would have their lien liquidated in the Federal Court, but if the litigation originated in the State Court and was continued in that Court, then the lien claimants' rights should be determined in that Court. Having lost in the State Court and being dissatisfied with the decision they now undertake to relitigate the question in the bankruptcy court.

POINT IV.

In respondents' argument at this point, they place great emphasis on the fact that the only matter before the State District Court was the struggle between the bankrupt Stuart and the trustee in bankruptcy and their respective attorneys as to who would prosecute the litigation. They seem to ignore the fact that in the course of their struggle, petitioners came up with a charging lien of fifteen per cent against any recovery that might have been made in the law suit. There must be a time and place not only in this jurisdiction but in every jurisdiction when any order which fixes a lien becomes final and appealable. Whether the order was appealable in twenty days, ninety days, or at the time the final judgment was entered dismissing the complaint, seems unimportant. The fact is the trustees and the bank were both parties to the litigation and at no time did they ever appeal from the order. The bank came voluntarily into the law suit. In fact, the bank accepted service of the Second Amended Complaint before it was ever filed (Tr. 34). It will be noted that Stuart, in the original complaint, set forth the rights of the bank (Tr. 34) and neither the bank nor the trustees in bankruptcy have ever cited any authority that the bank was a necessary party to the litigation.

We do not believe that Burns vs. Fleming, 48 N.M. 40, 145, P.(2d) 861, or Foster vs. Addington, 48 N.M. 12, 148, P.(2d), 373, are in point. In each case the orders entered were of an entirely different nature from this case. It must be borne in mind that the petitioners Jackson and Horan were never parties to the litigation. They were always the attorneys for a litigant and their lien was a public record when the bank entered the law suit.

The contract upon which the lien of petitioners was based was entered into more than four months prior to bankruptcy. The Circuit Court of Appeals has held that the state court's order (Tr. 1) was void on its face. It seems incredible to us that an agent of the bankruptcy court, which the trustee was, can avoid the order of the State District Court, which the trustee induced by his own conduct, or that the order can be held void as to him.

Great emphasis is given to the case of Gross vs. Irving Trust Company, 286 U.S. 342, and Taylor vs. Sternberg, 293 U.S. 470 by both lower courts, the Taylor case being the later of the two, reiterates the rule of the Gross case, but adds a distinguishing factor in support of petitioner's position. Petitioner has throughout this case maintained that there is no parallel between the case at bar and the Gross case, the Gross case being predicated upon receivers appointed by a State Court. Jackson and Horan were *never* appointed by the court as receiver and were never attorneys for a receiver. They were attorneys employed to represent a client and a litigant, and there is a wide distinction between them and a receiver and his attorneys appointed by a court.

The petitioner here predicates his claim upon a valid, subsisting contractual charging lien. In the Taylor and Gross cases, the status was that of a receiver and attorney for a receiver appointed by the court.

It is stated in Taylor v. Sternberg, supra:

> "The status of a receiver is unlike, for example, that of an assignee for the benefit of creditors. The receiver is an officer of the court which appoints him. (citing cases.) The property in his hands is not, in a legal sense, in his possession. It is in the

possession of the court, *whose appointee he is,* by him as its officer. (citing cases.) In the present case, with the supervening bankruptcy, the possession of the state court came to an end, and that of the bankruptcy court immediately attached. The result was binding on the state court and equally binding on the receiver as custodian for that court."

"Cases dealing with assignments, like Louisville Trust Co. v. Comingor, 184 U.S. 18, 46 L. ed. 413, 22 S. Ct. 293, 7 Am. Bankr. Rep. 421, cited by petitioners, in no way militate against this conclusion."

It is important to note that the Supreme Court of the United States makes a very clear and definite distinction between court-appointed receivers and other persons, such as assignees for benefit of creditors, who are not court-appointed but may be designated by the debtor as was the case here. No one has ever argued that petitioners considered themselves as receiving the fee for their services for the benefit of the State Court or anyone else. Petitioners expected to pocket a well-earned fee when collected, and were claiming it adversely to the bankrupt.

Louisville Trust Company v. Comingor, supra, is cited with approval and the principals stated therein are reiterated in Galbreth v. Valley, 256 U.S. 46, 65 L. ed 823, 41 S. Ct. 415, in which the court said:

"The principal of the Comingor case has never been departed from in this court. It established the right of an assignee for the benefit of creditors, to the extent that he asserts rights to expenses incurred and compensation earned under an assignment in good faith, before the bankruptcy proceedings, to have the merits of the claim determined in a judicial proceeding suitable to that purpose, and not by summary proceedings where punishment for the contempt is the

means of enforcing the order. We see no occasion to depart from this practice. There was no waiver by the assignee of his rights in this respect. He made no attempt to retain the body of the estate as against the trustee in bankruptcy. As to his disbursements and compensation while acting as assignee, he asserted an adverse claim. Under the settled rule of this court he could not be proceeded against summarily for such disbursements and compensation over his protest duly made, against that method of procedure. '

Analyzing the decisions of the Supreme Court in the Gross Case, Sternberg Case, and Galbreth Case, it can readily be seen that the Court is making a wide distinction and that there is a marked cleavage between receivers and their attorneys, who are court appointed claimants; and persons acting in their private capacities under contract or agreement with the bankrupt or creditors.

If the Circuit Court was attempting to distinguish the Sherman case from the case at bar, as we see it, it is impossible to do so. Further, the Gross and Taylor cases when carefully analyzed uphold our contention that the petitioner is entitled to his compensation secured by his lien, for by analogy petitioners have the same status as an assignee where the bankrupt, more than four months before bankruptcy, entered into a contract for services, services were performed, and compensation earned. The Sherman case was decided in 1941 and the Gross case in 1933. It is hardly conceivable that Mr. Justice Hand overlooked that decision. He was following the philosophy of the law as established throughout the decisions, that is to say, court-appointed — "No," non-court-appointed — "Yes." The court-appointed receiver is acting through the power of the court appointing him, which brings jurisdictional questions into issue. The petitioners, attorneys,

assignees, etc., are acting through their right and power to contract which Congress did not abrogate by the Bankruptcy Act.

POINT V.

Under Point V respondents present nothing that has not previously been discussed and presented to the Court. Consequently, we say nothing in connection with this.

CONCLUSION

In conclusion, it is respectfully submitted that there is no parallel between the case at bar and the Gross v. Irving Trust Case; that at no time were the petitioners ever employed by any court, State or Federal, in the prosecution of this litigation, or ever designated by any court to act, but they were attorneys employed by a client under contract in their private capacity to handle litigation for them.

As was pointed out by Mr. Justice Hand, had the trustee wished to avail himself of the exclusive jurisdiction of the bankruptcy court, he need never have entered the State Court, but he did. The position of respondents can only result in their having two days in Court, both of which they have selected themselves.

Since there is no parallel in our opinion between the cases cited by respondents and the case at bar, certiorari should be granted.

Respectfully submitted,

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No. 641

IN THE

Supreme Court of the United States

October Term, 1949

G. PULLEN JACKSON AND FRANK L. HORAN, a Partnership, practicing under the name of JACKSON AND HORAN, Petitioners,

v.

HARRY V. VANCE, Trustee of the Estate of WILLIAM O. STUART; and ALBUQUERQUE NATIONAL TRUST AND SAVINGS BANK, Respondents.

BRIEF OF RESPONDENTS

STATEMENT OF CASE

Deeming it necessary, the respondents, pursuant to paragraph 3 of Rule 27, of this Court, respectfully restate the case for the following reason:

In appealing the case to the Court of Appeals of the Tenth Circuit, the petitioners filed a skeleton transcript so brief as that the Court could not have determined the exact nature of the controversy (Tr. 1-18).

The respondents here, appellees there, filed a supplemental transcript in the Court of Appeals (Tr. 19-49). They feel that a chronological statement of facts now involved will assist the Court, and eliminate searching the transcript and the supplemental transcript, in an effort to rearrange the facts in chronological order.

Commencing July 30, 1946, and up to and including September 13, 1946, W. O. Stuart borrowed from the Albu-

querque National Trust and Savings Bank, upon five notes aggregating $58,850.00 (Tr. 35-41). He secured the Bank by depositing Douglas-Guardian Warehouse receipts on chattel property, written directly to the Bank (Tr. 41-42). He bought insurance on these goods, in his name, with a loss payable clause to the Bank, as its interest appeared, with three insurance companies, to-wit: Pacific National Fire Insurance Company, for $65,000.00, and American Home Fire Assurance Company, for $65,000.00, and the American Home Fire Assurance Company assigned half of its coverage to the New York Underwiters Insurance Company (Tr. 22).

Stuart owned other goods besides those covered by the Bank's warehouse receipts.

January 28, 1947, the goods were destroyed by fire.

February 1, 1947, Stuart employed Jackson and Horan, attorneys, to represent him in collecting the insurance upon a fee arrangement of 15%, without suit; 20%, if suit should be brought; and from 25% to 33 1/3%, if trial or appellate work was necessary (Tr. 1-2).

It is not claimed that the Bank had any part in employing these attorneys. On June 16, 1947, involuntary bankruptcy proceedings were filed against Stuart in the District Court of the United States for the District of New Mexico, and on the same day Jackson and Horan, as attorneys for Stuart, filed in the State Court a suit against the three insurance companies to recover the amount of the damage alleged to have been caused by the fire, aggregating $125,000.00 (Tr. 25).

The Bank, although holding warehouse receipts in its name, on what it alleges to be at least $60,000.00 in value

of the goods, was not made party defendant in the State Court, and there the matter rested.

July 14, 1947, respondent, Harry V. Vance, was elected trustee of the bankrupt estate of Stuart (Tr. 27).

August 14, 1947, Vance, as trustee, filed a motion in the State Court case, asking to be substituted as party plaintiff, which motion was filed by Threet and Hall, attorneys for the trustee (Tr. 25-26).

Jackson and Horan, as attorneys for Stuart, the plaintiff in the State Court case, attempted to resist the motion of the trustee to be substituted by other counsel, and moved to strike the trustee's motion. The State Court heard both motions together, and on the 21st of August 1947, denied Jackson and Horan's motion to strike the trustee's motion, granted the motion of the trustee to be substituted, and in the same order adjudged that Jackson and Horan had a charging and retaining lien as attorneys for Stuart, to secure a fee of 15% of the amount recovered in the cause, and the trustee excepted (Tr. 23).

On September 9, 1947, the trustee filed a second amended complaint in the State Court by his lawyers, Threet and Hall, setting up that he, as trustee for the estate of the bankrupt, owned the cause of action against the insurance companies, asking for judgment thereon, bringing in the Albuquerque National Trust and Savings Bank as a party defendant, and asking that the Bank be required to set up the extent and amount of its claims against the insurance fund (Tr. 26-33).

On the 9th of September 1947, the Bank filed its answer and cross-complaint (Tr. 35-47).

A year later on September 3, 1948, Jackson and Horan, who were not parties to the second amended complaint filed by the trustee in the State Court, nor to the cross-complaint of the Bank, without notice or bond, obtained an order to show cause and temporary restraining order from the State Court, prohibiting the defendant insurance companies from settling, compromising or entering into a stipulated judgment and settlement of the causes of action set forth in the second amended complaint, in neglect or disregard of the order of the State Court establishing the charging and retaining lien in favor of Jackson and Horan, and directing them to show cause (Tr. 47-48).

The statement made by the petitioners here in their Statement of the Case, on page 4 of their brief, as follows:

> "On September 3, 1948, petitioners discovered that the insurance companies, acting through their attorney, had entered into an agreement with the Albuquerque National Trust and Savings Bank for a stipulated judgment of $60,000.00 to be paid to the bank directly, ignoring petitioners' lien and bankruptcy proceeding."

is without support in the record, and we will not undertake to go outside the record to answer it. The improbability of a settlement in a large amount, by three insurance companies then under suit by the trustee, in disregard of the bankruptcy proceeding, would seem to be evident.

Faced with this State Court restraining order, the trustee appealed to Judge Neblett of the United States District Court in charge of the bankruptcy proceedings, and on October 25, 1948, the Federal Judge entered an order reciting that a compromise and settlement agreeable to all parties had been effected with the insurance com-

panies, and restraining Jackson and Horan from pursuing their claimed remedies in the State Court; directing them to dismiss their application for the restraining order; requiring the money under the settlement to be paid to the trustee in bankruptcy for administration in the bankruptcy Court, and holding that any rights of Jackson and Horan, which they might have as lien claimants should not be prejudiced, but that they should go into the bankruptcy proceeding with all their rights fully preserved; approving the action of a creditors' meeting accepting the compromise of $60,000.00 from the insurance companies, of which $35,000.00 was allocated to the security of the Bank, and $25,000.00 to the general funds of the estate, and directing both Jackson and Horan and the Bank to present their claims to the referee (Tr. 3-5). In obedience to this order the State Court case was dismissed with prejudice December 7, 1948 (Tr. 5).

The matter was heard by the referee; Jackson and Horan presented their claim for $9,000.00, being 15% of the compromise of $60,000.00, together with an unsecured claim of $2,836.81 (Tr. 7-8). The referee held that the order of the State Court, adjudging the charging and retaining lien in favor of Jackson and Horan, was res adjudicata of their right to collect their attorney's fees out of the proceeds of the settlement, but also held that it could only apply to the general funds of the estate in the amount of $25,000.00 and not to the Bank's secured portion, and gave judgment for Jackson and Horan for $3,750.00 (Tr. 9).

The matter was immediately reviewed by the trustee and the Bank, before District Judge Neblett, who, on February 15, 1949, entered an order adjudging that after the adjudication in bankruptcy of Stuart, June 19, 1947, three days

after he had filed his first complaint in the State Court against the insurance companies, the State Court was without jurisdiction to impress a charging and retaining lien in favor of Jackson and Horan upon the proceeds of such recovery as might be made upon the policies of insurance, and that the State Court's order was a nullity. He also held that Jackson and Horan had a right to file their claim before the referee and make proof of the value of their services, and that their payment could only come out of the $25,000.00 in the general funds, and no part thereof could be charged against the Bank (Tr. 10-12).

February 21, 1949, Jackson and Horan appealed to the Court of Appeals of the Tenth Circuit from both the order of October 25, 1948, and the order of February 15, 1949.

Speaking through Judge Bratton, the Court of Appeals affirmed the District Court, Judge Phillips concurring and Judge Murrah dissenting (Tr. 57). This petition for certiorari followed.

ARGUMENT AND AUTHORITIES

At the outset, we may eliminate any question of the order of the U. S. District Court of October 25, 1948. That order restrained Jackson and Horan from further proceeding in the State Court and directed them to dismiss their application for a restraining order, and after requiring the fund to be derived from the settlement with the insurance companies to be paid over to the trustee for administration by the bankruptcy court, it is specifically adjudged that any rights of Jackson and Horan, which they now have as a lien claimant in the District Court, should not be prejudiced in any manner, but that they were made parties to the bankruptcy proceeding (in which they were also unse-

cured creditors), and their rights as lien claimants were fully preserved for consideration by the bankruptcy court, and the compromise settlement approved by the common creditors and the distribution thereof, as agreed on before the referee by all parties, was affirmed (Tr. 3-5).

In the opinion of the Court of Appeals, Judge Bratton pointed out that since no appeal was taken from this order of the District Court, within thirty days, under Section 25 of the Bankruptcy Act, as amended, *52 Stat. 840, 855, 11 U.S.C.A. paragraph 48,* the correctness of that order was not before the Court. Petitioners do not challenge this holding. Such being the condition of the record the petitioners are confined to a consideration of the order of the Federal District Court made on February 15, 1949 (Tr. 10-12), and affirmed by the Court of Appeals.

POINT I

Under this Point, the petitioners say that the Trial Court erred in holding and finding that no lien had been created by the contract between Stuart and the petitioners, as confirmed by the order, judgment and decree of the State Court.

When Jackson and Horan, in obedience to the Federal Court order of October 25, 1948, presented their claim to the referee in bankruptcy, in the form of a motion to require the trustee to pay their claim of $9,000.00, they claimed a lien confirmed by court order, final in nature, a copy being attached and set forth, and stated that under the State Court order they had a prior lien over and above all other claimants on the fund of $60,000.00 (Tr. 6).

First, petitioners say that *Prichard v. Fulmer, 22 N. M. 134, 159 P. 39, 2 A.L.R. 474,* sustains their position. We

think not. New Mexico has no statute giving a charging or retaining lien to attorneys. The only question in the Prichard case was whether or not a lawyer who had foreclosed a mortgage for his cilents had a lien upon the real estate which they bought at the foreclosure sale. The Supreme Court answered in the negative. In the course of the opinion, the Court discussed the common law of charging and retaining liens, but went no further than to observe that the papers, documents and money of the client, which the lawyer had in his possession, were subject to such a lien. As applied to the facts of our present case, up to the time that the State Court on the 21st of August 1947, attempted to adjudicate and fasten a charging and retaining lien upon the ultimate proceeds of the suit against the three insurance companies, if, as and when liquidated and received, so far as the record here shows, Jackson and Horan had neither papers, documents or money belonging to their client, which they might claim to withhold from the trustee as successor in interest. There was no receivership. There was no property in possession of the State Court. It had before it only a suit for unliquidated damages on fire insurance policies, and an indispensable party, the Bank, had not been brought in, nor had the insurance companies filed any answer whatsoever. The State Court order of August 21, 1947, had nothing whatever upon which it could operate.

We do not have the question of the power of a State Court which has rendered a final judgment, and the process from which has effected collection, to prevent a client from defrauding his attorney out of the fee.

Petitioner's position here is tantamount to saying that a State Court can volunteer advice and binding instructions to the Federal bankruptcy court as to how the latter

shall treat lien claimants with reference to a fund of money if acquired in the future, by suit or compromise out of court.

The suggestion that the trustee, under the orders of the bankruptcy court, might so administer the recovery from the insurance companies as to defraud Jackson and Horan out of their just fee, would not seem to require extended discussion.

POINT II

Under this Point, the petitioners say that United States District Court was in error when it enjoined Jackson and Horan from pursuing their restraining order in the State Court, directed against the insurance companies, because the State Court had jurisdiction to enforce its order, fixing the lien, and the United States Court was without jurisdiction in bankruptcy to interfere with the State Court's proceedings.

Here we have a startling statement. Petitioners claim that the Federal Court in charge of the bankruptcy proceedings must sit with its hands tied and allow a State Court to reach into the administration before the referee and direct the payment of attorneys as lien claimants, as a matter of legal right and authority. They again cite *Prichard v. Fulmer,* supra, which, as above stated, holds nothing of the kind. The fallacy in the petitioners' argument here, when they cite *O'Hara v. Oakland Co., 136 F. (2d), 152, 6 CCA,* is that neither the Prichard case nor the O'Hara case presented any question of conflict of jurisdiction between the State Court and the Federal bankruptcy court. In the O'Hara case there was no question of bankruptcy intervening, nor of the paramount jurisdiction of

the federal tribunal under the bankruptcy act. Likewise, in the Prichard case the decision which is dictum beyond the point where the Court held the lawyer had no lien on his client's land, there was no question or bankruptcy or which Court should yield to the other, as we now have here.

We will notice the other cases cited by the petitioners under Point II, under our argument in the next paragraph under Point III.

POINT III

Under this Point, petitioners claim error in the action of the Federal District Court in holding that the State Court was without jurisdiction to award Jackson and Horan a lien on the fund which was created largely through their efforts.

At the outset, the Court will notice that Jackson and Horan created no fund; they merely filed an inadequate complaint in the State Court against three insurance companies, on the same day the involuntary petition in bankruptcy was filed against Stuart, to-wit, June 16, 1947. Whether Jackson and Horan succeeded in getting to the State Court a few minutes before or after the bankruptcy petition reached the Federal Court, the record does not show. The trustee could have dismissed this litigation and could have brought a new suit in either the State or Federal Court with proper parties. We cannot understand what fund the filing of the complaint created more than already existed under the policies themselves.

The petitioners place great stress on *Sherman v. Buckley, 119 F. (2d) 280.* The facts of that case differ so materially from our case that a short discussion of it would seem in order.

In *Sherman v. Buckley,* Judge Hand said that the trustee had one of three alternatives available. He could have himself substituted as the plaintiff in the action, or, he could take over the prosecution of it, leaving the bankrupt as the plaintiff, or he could have discontinued and made other disposition of his rights.

Vance, the trustee here, chose the first alternative, not the second, which the trustee chose in the case under discussion by Judge Hand.

It is noteworthy that in the *Sherman v. Buckley* case, Section 475, of the Judiciary Law of New York, was before the Court, which statute has to do with a charging lien of attorneys and of which we have no countedpart in New Mexico.

In the opinion, Judge Hand says "We need not, and we do not, hold, therefore, that if the trustee had brought Buckley and Buckley summarily into the bankruptcy court and insisted upon the liquidation of their lien, preparatory, for example, to a discontinuance or settlement of the action, they would have had any defense."

In our case, Vance, the trustee, did not avail himself of the second alternative. Before the necessary parties were even named in the pleadings and before the insurance companies had answered, he exercised his right to take over the cause of action as an asset of the bankrupt's estate and to substitute himself as the party plaintiff, with new lawyers, thus relieving Jackson and Horan. He took no action which in equity and good conscience should estop the trustee from questioning the amount and value of Jackson and Horan's services, nor has he ever done so, except to insist below and here, that District Judge Neblett's direc-

tion to Jackson and Horan, that they go into the referee's Court and submit their claim of lien to that tribunal, just as Judge Hand says the trustee might have done had he so elected, is correct.

We are unable to see how *Sherman v. Buckley* can be cited as establishing the rule that the trustee in bankruptcy in order to avail himself of his right to be substituted, with new counsel, in a State Court case, for the recovery of assets belonging to the bankrupt's estate, must, as a condition precedent, agree that the State Court shall exercise a supervisory control over the administration by the Bankruptcy Court of the proceeds of an unliquidated claim if, as and when received.

There are many situations in which it is to the advantage of the trustee and the estate of the bankrupt to take over and continue in the name of the trustee pending State Court litigation. If this were not true, the alternative would not be included in the bankruptcy law, but to add to this statutory right of the trustee the burden of consenting to a joint administration of the fund between the State Court and the Bankruptcy Court would produce endless confusion.

As to the cases of *In Re Prudence, 96 F. (2d) 157,* and *In Re San Juan Gold, Inc. 96 F (2d) 60,* we are not able to see how they are applicable here. In the *Prudence* case the attorney had prosecuted his client's claim to judgment and an appeal was pending when the client went into bankruptcy to reorganize under 77-b. The trustees allowed the bankrupt's attorney to go ahead with the second trial, knowing the fee arrangement, and when a recovery was made through the lawyer's efforts, the trustee sought to dispute his right to his fee. Such inequitable conduct is

certainly reprehensible and no element like it is present in our case.

In the *San Juan Gold, Inc.* case, a lawyer had possession of the books and records of his client, and when the Federal Court ordered him to turn them over without taking any testimony as to the value of his services, the Circuit Court of Appeals reversed and correctly held that the attorney had a right to be heard, but that hearing was not to be in the State Court but in the Bankruptcy Court, just as Federal Judge Neblett ordered in our case, both by the ruling of October 25, 1948 (Tr. 3-5), and again in his order of February 15, 1949, (Tr. 10-12).

At no point in the proceedings has the District Court nor the Court of Appeals sought to prevent Jackson and Horan from appearing in the Bankruptcy Court and giving evidence to the extent of their claim of lien, but they have insisted that the matter is not one for examination and adjudication by the Bankruptcy Court, but that they come in before the referee with the State Court order as res adjudicata of the nature and extent of their rights, which, of course, is a trespass upon the jurisdiction of the Federal Court (Tr. 6).

POINT IV

Under this Point, the petitioners say the District Court erred in holding the State Court order of August 21, 1947, a nullity insofar as it awarded Jackson and Horan the charging and retaining lien.

First, under this Point, the petitioners claim that *Nehr v. Crawford, 10 N. M. 725, 65 P. 156,* is authority for the

statement that the State Court order of August 21, 1947, was appealable, and since no appeal was taken, is final. They quote in the index excerpts from the Rules of Civil Procedure of the District Courts of the State of New Mexico, found in *19-201 (5) of the New Mexico Statutes Annotated, 1941,* official edition. We are surprised that petitioners have not quoted the second section of the same Rule, which reads as follows:

> "2. Appeals shall also be allowed by the District Court and entertained by the Supreme Court in all civil actions from such interlocutory judgments, orders or decisions of the District Court as practically dispose of the merits of the action, so that any further proceeding therein would be only to carry into effect such interlocutory judgment, order or decision. * * * * Application for allowance of an appeal under the provisions of this section must be made within twenty days from the entry of the judgment, order, decision or conviction appealed from."

Was the State Court's order of August 21, 1947, overruling Jackson & Horan's motion to strike the trustee's motion to be substituted, and sustaining the trustee's motion for substitution, and adjudging and fixing a charging and retaining lien of Jackson and Horan in the amount of 15% of the recovery, a final order? It could not have been, because there were no defendants in court and the struggle was between the bankrupt and his lawyers on one side, and the trustee and his lawyers on the other, seeking control of the case.

Was this an interlocutory order such as practically disposed of the merits of the action, so that any proceeding therein would be only to carry into effect the judgment, order or decision? Again we say that the order had no such

effect and did not purport to do so. It was merely disposing of the matter of who should continue the litigation as plaintiff before the defendants had answered, and was not an appealable order.

Judge Bratton, who wrote the opinion of the Court of Appeals, which petitioners seek to review in this proceeding by certiorari, and Judge Phillips who concurred with him, were both New Mexico practitioners, and they had no hesitation in holding that the State Court order substituting the trustee as plaintiff and attempting to fix a lien on the recovery entered on August 21, 1947, was not appealable, either under the ninety day provision for final judgments or under the twenty day rule for interlocutory judgments, which had the effect or practically disposing of the case.

The purpose of the litigation was to bring before the State Court the three insurance companies under an allegation that they had written policies and had refused to pay the loss, and for the purpose of determining the extent of it. That was the whole substance of the litigation and it had not even reached the stage where the pleadings had been settled or the defendants had appeared.

Judge Bratton cites in support of this holding, *Burns v. Fleming, 48 N. M. 40, 145 Pac. (2d) 861; Foster v. Addington, 48, N. M. 212, 148 Pac. (2) 373.*

Since it appeared from the face of the State Court order substituting the trustee, that Stuart had theretofore been adjudged a bankrupt and Vance was his duly elected trustee, it remains to consider whether, or not, so much of that order as attempted to establish and charge the ultimate collection with a lien in favor of Jackson and Horan,

was void upon its face and could not constitute res adjudicata, as Judge Bratton, in his opinion, held. This brings us to the main question presented by the application of the petitioners. This is whether *Gross v. Irving Trust Co., 286 U. S. 342, and Taylor v. Sternberg, 293 U. S. 470,* are still the law, and what their effect will be when applied to the record here. We fail to see how stronger language could have been used than was employed by the Court in the *Gross* case, saying that the filing of a bankruptcy petition is a caveat to all the world and, in fact, an attachment and an injunction; and further holding that the jurisdiction of the Bankruptcy Court is paramount. So District Judge Neblett held in his orders of October 25, 1948 (Tr. 3-5) and February 15, 1949 (Tr. 10-12).

This case does not present any of the features sometimes presented in State Court receiverships referred to in the *Gross* case, where comity requires the trustee to call attention of the State Court to the paramount jurisdiction of the Bankruptcy Court and request the setting aside of conflicting orders. While this presupposes that the State Court will immediately relinquish jurisdiction and abate such orders as may be in conflict, the ultimate power and authority of the Bankruptcy Court, under its exclusive jurisdiction, cannot be questioned.

POINT V

This Point seems to have been eliminated by the opinion of the Court of Appeals holding that a void order of the State Court, after exclusive jurisdiction had passed to the Bankruptcy Court, was a nullity. It could not have been res adjudicata. And since it was not a final judgment

appealable within the ninety day rule, nor an interlocutory judgment having the effect of practically disposing of the merits of the case, within the twenty day rule, it was not appealable.

If it was void, the subsequent appearance of the Bank as a defendant and cross-complainant in the litigation, could not have the effect of preventing the Bank, or the trustee, from calling attention to the void nature of the order.

CONCLUSION

Denial of certiorari in the *Sherman* case is, as we understand the rule, nothing more than the decision of this Court to the effect that the record presented no necessity for review.

Petitioners here are, in effect, saying that because Judge Hand, in the *Sherman* case, held the trustee must pay the attorney's fees, under the circumstances there presented by the second alternative course of action available to the trustee, it necessarily follows that in our case the trustee and the Bankruptcy Court must submit to the State Court order in a case where the trustee chose the first alternative as his course.

If the position of the petitioners is correct the statutory right under the bankruptcy act of a trustee to substitute himself and his own attorneys in State Court litigation, and to oust the bankrupt and his counsel therefrom, must be purchased by the trustee at the price of submitting to the orders of the State Court not only as to the conduct of the litigation but also as to the distribution of the proceeds when realized. If this be the law, then *Gross v. Irving*

Trust Company must be overruled and the exclusive jurisdiction of the Bankruptcy Court must be repudiated.

We submit that the petition for the writ of certiorari should be denied.

Respectfully submitted,

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